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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Status of the international covenants on human rights

Report of the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

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Summary

In 1996, the Committee on Economic, Social and Cultural Rights submitted to the Commission on Human Rights a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights (E/CN.4/1997/105, annex). The independent expert has studied the draft, the report of the workshop on the justiciability of economic, social and cultural rights held on 5 and 6 February 2001 (E/CN.4/2001/62/Add.2) and the comments made by States, intergovernmental and non-governmental organizations; he has also consulted the parties concerned on several occasions.

The independent expert believes it is necessary to press ahead towards the possible adoption of the draft optional protocol; he believes that many of the questions discussed in this report - which is more than a simple inventory - need to be studied in more depth.

The independent expert recommends adoption by the Commission of a resolution covering, inter alia, the three points below:

A. The Commission confirms that States are solemnly committed to the eventual adoption of a draft optional protocol;

B. It establishes the principle of setting up an open-ended working group to consider the question of a draft optional protocol; and

C. It renews the mandate of the independent expert so that he can continue his investigations in greater depth and submit to the Commission at its fifty-ninth session a report which the working group can use as a basis for starting work.

Introduction

A. General framework

1. By resolution 2001/30, the Commission on Human Rights at its fifty-seventh session decided to appoint, for an indefinite period, an independent expert to examine the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights and report to the Commission at its fifty-eighth session with a view to its consideration of possible follow-up and future actions, including the establishment of a working group to examine the question of a draft optional protocol to the Covenant (para. 8 (c)).

2. The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly at the same time as the International Covenant on Civil and Political Rights, entered into force on 3 January 1976. No one could have foretold, when the "twin treaties" - which, together with the Universal Declaration of Human Rights, make up what has come to be known as the International Bill of Human Rights in view of their decisive influence on all international human rights treaties both inside and outside the United Nations system - came into being, what different fates awaited them.

3. It is worthwhile remembering that the original idea was to draw up a single covenant, enforceable among States parties, that covered all the rights and freedoms set forth in the Universal Declaration; later on it was decided, for reasons to do with the ideologies of the day, to adopt two separate covenants. At the same time, care was taken to announce the adoption of the two Covenants on the same day in a single resolution (2200 A (XXI)), in solemn confirmation, as it were, of the link that should forever bind them. To make the almost-obvious link still stronger, the preambles and articles 1, 2, 3 and 5 of the two Covenants are virtually identical.

4. The preambles state that "in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (both Covenants) and that "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights" (International Covenant on Civil and Political Rights).

5. The first article of each Covenant reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 2 in each Covenant contains a paragraph in which States parties undertake to ensure that the rights it recognizes may be exercised without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national social origin, property, birth or other status. Article 3 in each Covenant affirms that States undertake to ensure the equal right of men and women to the enjoyment of all the rights set forth in the Covenant concerned. Both article 5s establish safeguards against the destruction or undue limitation of human rights and fundamental freedoms and the misinterpretation of the Covenants to justify the violation of a right or freedom or the

limitation of a right or freedom to a greater extent than is provided for in the Covenants. They also prohibit States from restricting rights that already exist within their territory on the pretext that the Covenants do not recognize them or recognize them to a lesser extent.

6. These two vital instruments were very soon subjected to a difference in treatment, however: from the outset, a treaty body was set up to monitor and follow up on the International Covenant on Civil and Political Rights, ensuring that States parties honoured the obligations they had taken on. The Human Rights Committee, made up of independent experts, considers periodic reports submitted by States on the measures they have adopted to give effect to the rights recognized by the Covenant and on the progress made in the enjoyment of those rights (art. 40). But the Committee is also empowered, under the first Optional Protocol to the Covenant and subject to the admissibility criteria which the Protocol lays down in articles 2, 3 and 5, to receive and consider communications from individuals subject to the jurisdiction of a State party who claim to be victims of a violation by that State of any of the rights set forth in the Covenant.

7. In contrast, the International Covenant on Economic, Social and Cultural Rights was not provided with a follow-up body of independent experts. Initially the United Nations Economic and Social Council was supposed to receive and examine the periodic reports submitted by States parties (art. 16). In 1985, given the avowed inefficiency of this monitoring and follow-up procedure which was entrusted to a political working group, a committee of independent experts was set up by resolution of the Economic and Social Council. As it turned out, the Committee on Economic, Social and Cultural Rights, which held its first meeting in 1987, was to embark on a veritable methodological and substantive mission with the help it gave States in discharging their obligations to the best of their ability by drawing up general observations on how States gave effect to the rights set forth in the Covenant. As yet, however, there is no official procedure whereby individuals claiming to have suffered violations by a State party of any of the economic, social or cultural rights set forth in the Covenant can submit communications to the Committee.

8. Since 1990 there has been much discussion about whether it is appropriate to adopt an optional protocol to the International Covenant on Economic, Social and Cultural Rights, giving it greater force by allowing the consideration of communications relating to the rights it sets forth. At its seventh session, on 11 December 1992, the Committee on Economic, Social and Cultural Rights adopted an analytical paper on the subject of a draft optional protocol which it submitted to the Preparatory Committee for the Vienna World Conference on Human Rights (see A/CONF.157/PC/62/Add.5, annex II). In 1996, the Committee reached consensus on the need for such an individual communications procedure and submitted a draft optional protocol to the Commission on Human Rights for consideration at its fifty-third session, in 1997 (E/CN.4/1997/105, annex; see also E/1997/22 and E/C.12/1996/6, chapter V and annex IV).

9. For three years running the Commission would receive comments and observations from States, intergovernmental and non-governmental organizations on the subject of the draft optional protocol. Throughout that period it was clear that, while the non-governmental organizations were generally firmly in favour of the adoption of an optional protocol, with occasional differences in views relating basically to how to go about it, a good many States had reservations and doubts, or were at least somewhat reticent, as the dearth of comments from

them illustrated. A fairly small number of States both approved and supported the draft optional protocol. The comments made on the topic are reproduced in documents E/CN.4/1998/84 and Add.1, E/CN.4/1999/112 and Add.1, E/CN.4/2000/49 and E/CN.4/2001/62 and Add.1.

10. On 20 April 2001, at its fifty-seventh session, the Commission, taking note inter alia of the report of the workshop organized on 5 and 6 February 2001 by the Office of the United Nations High Commissioner for Human Rights and the International Commission of Jurists on the justiciability of economic, social and cultural rights (E/CN.4/2001/62/Add.2) and the report of the High Commissioner on the draft optional protocol to the Covenant (E/CN.4/2001/62 and Add.1), decided by resolution 2001/30 to appoint an independent expert to examine the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights in the light, inter alia, of the report of the Committee on Economic, Social and Cultural Rights to the Commission on a draft optional protocol (E/CN.4/1997/105, annex), the comments made in that regard by States, intergovernmental organizations and non-governmental organizations, and the report of the workshop on the justiciability of economic, social and cultural rights; the expert was to submit a report to the Commission at its fifty-eighth session with a view to its consideration of possible follow-up and future actions, including the establishment of an open-ended working group to examine the question of a draft optional protocol to the Covenant.

11. One step has certainly been taken towards the possible adoption of a draft protocol, a step that doubtless reflects movement on the question among member States even if the Commission's resolution does not seem to display any great commitment, as was made plain by the Sub-Commission on the Promotion and Protection of Human Rights in its resolution 2001/6 of 15 August 2001 in which, while welcoming the decision of the Commission to appoint an independent expert, it expressed the opinion that an intersessional open-ended working group of the Commission was the appropriate mechanism to examine the question of a legally binding instrument such as a draft optional protocol to the Covenant. The Sub-Commission accordingly urged the Commission to "give high priority" to the question and repeated "its suggestion that the Commission ... establish at its fifty-eighth session an intersessional open-ended working group entrusted with the further study of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights". In that same resolution, lastly, the Sub-Commission decided to continue to follow progress towards the elaboration of a draft optional protocol to the Covenant at its fifty-fourth session.

B. Consultations by the independent expert

12. Since his appointment, the independent expert has met the High Commissioner and Deputy High Commissioner; he is grateful to both for their advice and encouragement. A schedule of consultations put together with the High Commissioner's support led to a first series of consultations and meetings, between 20 and 24 August 2001, with members and officials of the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Rights of the Child and the International Labour Organization.

13. A second series of consultations, held between 27 November and 7 December 2001, included a meeting with the permanent delegations of member States that had responded to an invitation from the Office of the High Commissioner. Though many States were absent, the

meeting was highly beneficial: it gave the independent expert an opportunity to hear first-hand the views of the States that were represented on the question of the draft optional protocol and to engage in a constructive and fruitful dialogue, which enabled him to make useful progress in his study.

14. During this second series of consultations, the independent expert also attended a round table organized on 30 November 2001 by the International Commission of Jurists on the question of a draft optional protocol; besides representatives of States, this was also attended by university professors of international renown and two members of the Committee on Economic, Social and Cultural Rights. In the view of all participants, the round table was very helpful: being basically informal, it had enabled them to consider the various legal and other questions relating to the draft protocol submitted by the Committee on Economic, Social and Cultural Rights and possible future action to move the proposal forward.

I. THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

A. The current situation

15. One of the difficulties often raised by many of the States that still have misgivings about the draft optional protocol has to do with the nature and scope of the obligations that States parties to the Covenant must shoulder. The arguments they put forward, without denying the principle that all human rights are of equal value and are universal, indivisible, interdependent and interrelated, dwell on the difference in nature between civil and political rights, on the one hand, and economic, social and cultural rights, on the other.

16. Civil and political rights are said to be sufficiently well-defined, often engendering an "obligation not to do something": not to subject an individual to torture or to cruel, inhuman or degrading treatment or punishment; not to keep an individual in slavery or servitude or require him to perform forced or compulsory labour; not to carry out arbitrary arrests or detention; not to interfere arbitrarily or illegally in a person's private life, family, home or correspondence, or attack his honour and reputation unlawfully; not to infringe his freedom of thought, conscience and religion, etc. All of these are supposedly obligations of result, obligations which are measurable by their very nature, and hence not subject to shades of meaning. With this category of international commitments, as set out in the International Covenant on Civil and Political Rights, States parties cannot simply undertake to do their best to honour their undertakings. Any of these obligations has been totally ignored, and the right concerned violated, the moment a State does something it is forbidden to do. This is what makes the obligations assumed under the Covenant measurable, and earns them the description of obligations of result.

17. Economic, social and cultural rights, by contrast, often create for the State an "obligation to do something" - in the words of article 2, paragraph 1, of the Covenant, "to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

18. The difficulty raised by this clause of the Covenant, which has no counterpart in the International Covenant on Civil and Political Rights, is compounded by another which adds to the misgivings voiced by many States that fear that with a communications procedure, the international body that dealt with communications might feel constrained, on occasion, to examine a country's economic, social and cultural policy in detail. That, besides overlapping or creating a conflict with the procedure for considering States' periodic reports as laid down in article 16 and the following articles of the Covenant, would entail a risk of social interference unacceptable in an area over which, under international law, the State theoretically has exclusive jurisdiction.

B. Position of the independent expert

19. Contrary to what is sometimes suggested in discussion papers and position statements here and there, downplaying the import of the progressive realization of economic, social and cultural rights and regarding the wording of article 2, paragraph 1, of the Covenant as purely fortuitous, without any great relevance to the substantive issue, the independent expert believes that this clause - which has no counterpart in the International Covenant on Civil and Political Rights - merits close attention. It does not of itself diminish the value of economic, social and cultural rights in any way: nowadays, indeed, it is increasingly asserted and admitted that a person living in extreme poverty or want faces a situation in many ways comparable to that of a person subjected to atrocities or torture. The resulting discussion is therefore not - or at least, does not need to be - one about the acknowledged value of these rights or where they belong in the international human rights hierarchy. As the Vienna Declaration and Programme of Action acknowledge, all human rights are universal, indivisible, interdependent and interrelated, and do not lend themselves to any attempt at ranking.

20. These are well-worn arguments. Nonetheless, the obligations that States assume under the International Covenant on Economic, Social and Cultural Rights are generally presented, because of their objective, not as obligations of result but as obligations of means. In other words, States - particularly the poorest States - cannot be held solely responsible for the difficulties they encounter in meeting the vital needs of their populations. Quite often they have only assumed a general obligation of diligence, so to speak, undertaking to do all they can to bring about the progressive realization of the rights set forth in the Covenant. They would love to accomplish all that is humanly and socially desirable, but can only really, sustainably guarantee what is economically possible. How, that being the case, is it possible to provide precise definitions, within the general obligation of diligence assumed by States parties, of genuinely measurable obligations? How, in other words, are the provisions of the Covenant to be translated into clearly defined commitments so that individual breaches of them can give rise to remedies under the communications procedure established by the draft optional protocol?

21. Even so, in this paper the independent expert proposes to press ahead towards the possible adoption of the draft optional protocol to the Covenant, in the light, among other things, of the Committee's aforementioned report to the Commission. He will attempt to dispel the difficulty and the misgivings he has mentioned by considering, beginning with the suggestions made by States members in their comments on the Committee's report, some very helpful observations by certain intergovernmental and non-governmental organizations and the views of certain writers and authorized experts, what possibilities and options are open, so that he can

strike a coherent balance among what are sometimes necessarily divergent concerns. In so doing he will draw on the experience gained in recent years from the application of regional and national human rights instruments.

22. Coming barely four months after the first consultations the independent expert held, between 20 and 24 August 2001, this report is necessarily a preliminary one. While recognizing that he must not get ahead of himself, the independent expert hopes that his initial observations will prove to be more than a simple inventory, resulting instead in a thorough traversal of the questions raised, accompanied in each case by a statement of the options available, so that useful progress can be made towards the possible adoption of the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights.

II. THE QUESTIONS RAISED

23. Four basic questions will be discussed in the sections below, yielding answers to the main points raised in debates on the draft optional protocol:

(a) Which of the rights set forth in the Covenant would be covered and could serve as the basis for a communications and complaints procedure?

(b) What body would be competent to receive and consider communications alleging violations of economic, social and cultural rights?

(c) Who might be entitled to bring a complaint about an alleged violation of his rights, and what admissibility criteria should govern such a procedure?

(d) What action - possibly including interim solutions and negotiated settlements - might be suggested or decided on by the Committee on Economic, Social and Cultural Rights to remedy violations by a State party of its obligations?

A. Rights covered

1. The current situation

24. The draft put forward by the Committee to the Commission in 1996 would allow recourse under the proposed procedure against violations of all the substantive rights set forth in the Covenant apart from the right to self-determination recognized in article 1, which, it was pointed out - not without cause - could leave the procedure in grave danger of being misused, especially since the right to self-determination was proclaimed in exactly the same words in article 1 of the International Covenant on Civil and Political Rights and the Human Rights Committee, which was better suited to discussing the issue, had adopted a cautious or restrictive approach to its application. The Committee pointed out, however, that the other general principles set forth in articles 2 to 5, viz. the principle of non-discrimination and the equal right of men and women to the enjoyment of the rights set forth in the Covenant, would always be fully applicable and would serve as the basis for interpreting and monitoring how States gave effect to the rights covered by articles 6 to 15 of the Covenant.

25. This rather broad approach that the Committee on Economic, Social and Cultural Rights proposed was also intended to be an omnibus one, in the sense that any State becoming a party to the optional protocol would have to accept that the procedure set up for the submission of communications and complaints applied to all the rights recognized in articles 2 to 15 of the Covenant.

2. Position of the independent expert

26. The independent expert would like to begin by pointing out that the broad omnibus approach taken by the Committee on Economic, Social and Cultural Rights to the rights covered is clearly divergent from all those taken in recent years under regional instruments, such as the Inter-American system established by the Additional Protocol to the American Convention on Human Rights (the Protocol of San Salvador) under which individual petitions are admitted only as a means of upholding trade union rights and the right to education, while the Additional Protocol to the European Social Charter adopted by the Council of Europe in 1995 establishes an "à la carte" system under which ratifying States are free to choose which rights they consider themselves bound by.

27. To measure the true scope of the Committee's approach it is important to remember how consistent the rights set forth in the Covenant are. Besides the rights and general principles laid down in articles 2 to 5, which those protected can assert for the purpose of interpreting and monitoring how States are giving effect to the rights set forth in the Covenant, articles 6 to 15 recognize the right to work (art. 6), the right to just and favourable conditions of work (art. 7), the right to form and join trade unions (art. 8), the right to social security, including social insurance (art. 9), the right of families, mothers, children and young persons to the widest possible protection and assistance (art. 10), the right to an adequate standard of living (art. 11), the right to enjoyment of the highest attainable standard of physical and mental health (art.12), the right to education (arts. 13 and 14), and the right to take part in cultural life (art. 15).

28. In other words, the Committee - or any other body authorized to deal with communications and complaints under the draft optional protocol - would have to intervene over a very extensive range of rights which it is at the moment the responsibility of a number of different institutions and international monitoring bodies to follow up. As it happens, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has, pursuant to its mandate, drawn up many standard-setting human rights instruments, especially in the educational field, education being considered an empowering right which provides the means of upholding the principles of non-discrimination and equal opportunity, as recognized inter alia in the Convention against Discrimination in Education which it adopted on 14 December 1960. Since then it has passed other binding instruments, in the form of decisions of the General Conference, instruments adopted at intergovernmental conferences, and instruments adopted in the form of UNESCO Executive Board decisions. The procedure for examining complaints received at UNESCO about alleged violations of the human rights that fall under its jurisdiction, i.e. education, science, culture and information, offers an edifying example: it is defined in Executive Board decision 104 EX/3.3, and applied by a body subsidiary to the Board, the Committee on Conventions and Recommendations, to which States accord jurisdiction simply by

being members of the organization. In practice, even States that are not members of UNESCO have been perfectly willing to allow communications concerning them to be considered by the Committee.[1]

29. The International Labour Organization (ILO) is definitely an international agency that has traditionally been concerned with human rights in the workplace, given that it has, since its founding in 1919, adopted no less than 182 international labour conventions defining in the minutest detail the various aspects and ways of giving effect to rights relating to work and the lives of workers and their families. Among these are the eight conventions on fundamental principles and rights at work, as recognized in the ILO Declaration on Fundamental Principles and Rights at Work which the International Labour Conference adopted at its eighty-sixth session, on 18 June 1998:

(a) Freedom of association and the effective recognition of the right to collective bargaining (Conventions 87 and 98);

(b) The elimination of all forms of forced or compulsory labour (Conventions 29 and 105);

(c) The effective abolition of child labour and elimination of the worst forms of child labour (Conventions 138 and 182);

(d) Equal treatment and the elimination of discrimination in respect of employment and occupation (Conventions 100 and 111).

30. It is true that this statement is often met with allusions to the supposed ineffectuality of ILO, which is said to be going through "a deep crisis, extending so far as to undermine its credibility".[2] This judgement seems harsh, unfairly overlooking the efforts made and results achieved in bringing national legislation into line with rules and values inspired by international standards. In any event it ignores the fact that the only effective reactions are measured ones; the danger with "laying it on thick" is often that of becoming a mere bugbear that fails to influence its target audience.

31. Either, putting the emphasis on labour and hoping to bring about a sort of awareness in international society of the problems engendered by the survival, here and there, of socially unacceptable situations, one can mobilize and strengthen the ILO monitoring machinery, advancing selectively and mapping out successive stages so as to preserve a sort of minimum social platform of values to be promoted as universally recognized human rights. Or, deciding that employment and working conditions must be standardized at any price, one can seek to coerce developing countries into matching the social standards reached in the developed countries. One cannot do both. One's motives, like the values and minimum rules one seeks to promote and the follow-up mechanisms that need to be invented or re-invented, will vary depending on the course one follows.

32. There is also, surely, a danger that two international investigating or settlement bodies will end up differing in their interpretations of international labour standards and the rights and obligations they define. This is a particularly tricky issue in areas where ILO has developed a

communications and complaints procedure, chiefly the procedure whereby the Committee on Freedom of Association, a tripartite organ of the ILO Governing Body, takes up complaints about violations of the freedom of association coming from governments, employers' organizations or workers' organizations. Set up in 1951 pursuant to agreements between the ILO Governing Body and the United Nations Economic and Social Council, the Committee was designed to supplement the general procedures for monitoring the application of ILO standards. To date it has considered over 2,000 cases, generating a collection of decisions and principles covering most aspects of the freedom of association and the protection of trade union rights which, in view of their widely recognized rigorousness, clarity and concision, are regarded as authoritative and have in many instances spurred advances in trade union law and practice in States' domestic legal systems.

33. The independent expert emphatically underscores these difficulties which, it should be pointed out, rarely arise in connection with the rights set forth in the International Covenant on Civil and Political Rights because the jurisdiction of the Human Rights Committee appears to be so much more restricted and does not conflict with that of other bodies set up by international organizations. If, besides, one bears in mind that nowadays many of the rights set forth in the International Covenant on Civil and Political Rights are justiciable before treaty bodies concerned with the application of other international human rights instruments, the extent of the problems becomes even more apparent. Since recently, in particular, the rights covered by the Convention on the Elimination of All Forms of Discrimination against Women have come under the jurisdiction of the Committee on the Elimination of Discrimination against Women, following the adoption of the Optional Protocol to the Convention which allows communications to be submitted by or on behalf of individual women and groups of women claiming to be victims of a violation by a State party of any of the rights which the Convention sets forth (art. 2 of the Protocol), provided that the State concerned recognizes the competence of the Committee and that the communications satisfy the admissibility criteria - in particular, that the plaintiff has exhausted all available domestic remedies and the same matter is not already being examined under another procedure of international investigation or settlement (art. 4).

34. In the circumstances, the independent expert feels that the field of application of the procedure called for in the proposal to draft an optional protocol to the International Covenant on Economic, Social and Cultural Rights needs to be restricted as regards the rights covered. This does not mean that certain rights encompassed by other international procedures of investigation or settlement should be excluded, for that would be to introduce a new, intolerable kind of discrimination among the various economic, social and cultural rights. Remedies for all the rights set forth in the Covenant, as the Committee on Economic, Social and Cultural Rights stoutly maintains in its draft, should be available under the current draft protocol. The idea is rather, given the difficulties mentioned above with how far the rights really lend themselves to such a procedure and the conflicting jurisdictions of other international bodies, to restrict the proposed new procedure by introducing a new criterion limiting it to "situations revealing a species of gross, unmistakable violations of or failures to uphold any of the rights set forth in the Covenant". Such a criterion would at the same time allay the uncertainties and doubts voiced by many member States which fear that the proposed procedure might give rise to arbitrary appeals against simple oversights or shortcomings in the action they take under their policies and programmes to progressively achieve the various economic, social and cultural rights recognized in the Covenant.

35. By assigning the new investigating or settlement body jurisdiction over cases of gross, unmistakable violations of or failures to uphold the rights concerned, this criterion would at the same time enable it to draw on the relevant comments made in their reports to the Commission on Human Rights by the special rapporteurs on questions relating to the rights set forth in the Covenant, among them the right to education (E/CN.4/1999/49 and E/CN.4/2001/52), the right to adequate housing (E/CN.4/2001/51) and the right to food (E/CN.4/2001/53). These define cases revealing gross, unmistakable violations of or failures to uphold the rights concerned in great detail and with much precision: they could serve as examples of the type of case that would trigger the proposed international investigative or settlement procedure.

36. Advantage can also be taken, on all issues relating to the basic rights of workers as covered in articles 6 to 9 of the Covenant and elsewhere, of the comments of the ILO Committee of Experts on the Application of Conventions and Recommendations and, in the case of trade union rights, the Committee on Freedom of Association, since ILO has, as mentioned above (para. 29), adopted the Declaration on Fundamental Principles and Rights at Work; these serve to define a minimum social platform of values for promotion as universally recognized human rights which could help to provide precise definitions of the kinds of cases which, where these issues are concerned, reveal flagrant, unmistakable violations of or failures to uphold the various rights.

37. By so doing, the risks of overlapping with or diverging from other investigative or settlement bodies can be substantially reduced. Other considerations then come into play, alleviating the difficulties and making the new procedure called for in the draft protocol thoroughly appropriate and worthwhile:

(a) The independent expert wishes to point out that the current procedures applied by the bodies reporting to other international organizations, such as the Committee on Freedom of Association, are not open to individuals but only to complaints of violations of freedom of association submitted by governments, employers' or workers' organizations. It is clearly worth while enabling individuals or groups of individuals to submit to a United Nations body communications about violations that they themselves have suffered, and thus to have access, as prime intended beneficiaries of the international human rights instruments, to the procedures designed to give stronger effect to their acknowledged rights. This would surely be an edifying illustration of the potential benefits of the United Nations system as a whole in improving the human condition - which is so often presented as the prime objective of international action;

(b) The risk of divergent interpretations of international standards of protection and the rights and obligations defined in various places can also be diminished thanks to the cooperation that has grown up in recent years among the bodies responsible for enforcing these standards. In performing its task of considering States' periodic reports and making its related general comments (HRI/GEN/1/Rev.1), for example, the Committee on Economic, Social and Cultural Rights has often drawn on the international labour conventions and the comments made by the appropriate ILO committee of experts. Such cooperation over investigation and settlement procedures could be developed further by a variety of means;

(c) The same comment could be made about the communications procedure established under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Although the rights covered intersect at many points, advantage can be taken in practice of the coordination that cannot fail to evolve between the two monitoring bodies as regards the interpretation and application of the rights concerned by States parties.

B. Competent body

1. The current situation

38. The draft submitted by the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights would make the Committee the body competent to examine complaints and communications under the proposed investigation and settlement procedure; a priori this is an entirely justifiable choice, given the Committee's accumulated experience and authority over the years since its inception. One may wonder, however, whether the Committee as currently constituted and with the means at its disposal is really in a position to accomplish the task, which would enlarge its mission substantially and add to the difficulties it is experiencing in coping fully and in good time with its primary mission, that of considering States' periodic reports.

2. Position of the independent expert

39. The independent expert believes there is a conflict of authority to be discerned in the prerogatives accorded to the treaty bodies: on the one hand, considering periodic reports from States parties; on the other, considering complaints and communications about alleged violations of the human rights covered by the various international instruments. Quite apart from the practical difficulties often mentioned in his consultations with officials from the Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the Committee on the Rights of the Child, which often have to do with the excessive workload on the various committee members, the two activities are indeed somewhat incompatible and there is a danger that the conditions in which the committees work and the quality of the work that they do may suffer. It is a hard assignment for one body, first to engage a State party in constructive, fruitful dialogue, during the consideration of periodic reports, on the steps it has taken and the machinery it has established to give full effect to the rights set forth in some international convention - essentially a non-confrontational, consultative exercise - and then to behave as a quasi-judicial investigative and settlement body. It should opt for one or the other.

40. Above all, it is hard to be sure that, when functioning as an investigative and settlement body, the Committee will not feel too constrained by the position it has taken during its examination of a State party's periodic reports. Though the overall economic, social and cultural policy a State pursues may be closely linked to the extent to which that State respects the rights of the individuals or groups under its jurisdiction, it has to be said that the two issues do not necessarily coincide. One can imagine cases where a State which the Committee has found, during consideration of its periodic report, to follow policies and act in general very much in keeping with the Covenant has, in particular instances, infringed the rights of individuals or

groups of individuals, whereas another State, in whose actions the Committee has identified shortcomings and thus made a number of recommendations for it to follow in the future, may be absolved of all responsibility when complaints against it are considered.

41. This observation, which is certainly not restricted to the Committee on Economic, Social and Cultural Rights, nonetheless applies all the more strongly to it when one considers the rights on which a communications and complaints procedure might be founded. The quality of the Committee's discussions with States parties, which so often give rise to recommendations and opinions going beyond strictly legal arguments to encompass important aspects of the States' economic, social and cultural policies and programmes, could suffer if States became loath to speak openly to a body which they knew they would be facing again later, over the cases it had under consideration, as a quasi-judicial investigative and settlement institution.

42. For once, the solution might be to separate the two activities, entrusting the task of investigating and settling complaints either to a group, reporting to the Committee, of experts highly experienced in the settlement of legal affairs whose particular and exclusive responsibility this would then become, or to a new body altogether, a sort of parallel committee whose responsibility it would be to handle the new communications and complaints procedure under the proposed draft optional protocol.

43. The independent expert points out that the two activities are separate and operate harmoniously under the procedures established by other international bodies. At ILO, for example, the Committee of Experts on the Application of Conventions and Recommendations is responsible for considering States' periodic reports on the conventions they have ratified - and indeed on conventions they have not - while other bodies, such as the Committee on Freedom of Association, handle investigation and settlement procedures. A similar separation of the two activities exists in the system established by UNESCO.

44. The independent expert would like to go into this question more thoroughly, thus opening the way, within the current system set up under the various international human rights instruments, for a new, possibly useful procedure, and making ready to extend it to other treaty-based procedures as part of a general, coordinated system which reallocates the tasks of examining States' periodic reports and investigating and settling complaints that are currently assigned to the various monitoring bodies.

C. Scope for individuals or groups to lodge complaints

1. The current situation

45. The draft submitted by the Committee to the Commission is clearly slanted in favour of strictly individual communications, thus ruling out other kinds of procedure such as that defined in article 41 of the International Covenant on Civil and Political Rights which empowers the Human Rights Committee to receive and consider communications to the effect that a State party claims another State party is not fulfilling its obligations under the Covenant, provided that the submitting State has made a declaration recognizing the competence of the Committee in respect of itself.

46. Can such a procedure be contemplated for a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights? Would it be appropriate to make provision for other procedures, allowing the Committee to launch investigations at its own behest so as to make inquiries and gather evidence on the extent to which a given State respects any of the obligations set forth in the Covenant, or authorizing groups or non-governmental organizations to submit communications or complaints?

2. Position of the independent expert

47. The independent expert is quite prepared to endorse the comments the Committee makes in its report. There would be no point in assigning the Committee - or any other body established for the purpose - jurisdiction to receive communications in which one State party claimed that another was not fulfilling its obligations under the Covenant; that would add to the current difficulties and risk politicizing the discussions under the proposed complaints and communications procedure. On the other hand, there is merit in establishing a new procedure and allowing groups duly empowered by alleged victims to submit complaints. That would be consistent, as the Committee rightly pointed out in its report, with the reference in Commission on Human Rights resolution 1994/20 to "granting the right of individuals or groups to submit communications" (para. 6). Such an opportunity should not, however, be extended, in the independent expert's view, to third parties claiming to have a sufficient interest in violations whose victims they cannot represent.

D. Possible means of remedying violations by States parties of their obligations

1. The current situation

48. The draft submitted by the Committee to the Commission would authorize the Committee, subject to the admissibility criteria laid down in article 3 of the draft optional protocol, to initiate a number of inquiries and, while these are proceeding, invite the State party to communicate to it, within six months or such other period as the Committee may determine, its position on the allegations made in a communication. The Committee could also put itself at the disposal of the parties to the dispute for the purpose of reaching an amicable settlement and negotiating around obstacles.

49. The Committee would also be empowered to call for interim measures to be taken in potentially serious cases involving the possibility of irreparable harm (art. 5 of the draft). If, at the conclusion of the proceedings, it upheld the complaint and found that a violation had occurred, it could decide what action should be taken to remedy the situation and so inform the State concerned, which would then have six months, or such other period as the Committee might determine, to inform it what action it had actually taken (arts. 6 and 7). The Committee could also invite the State to discuss with it what measures it should take.

2. Position of the independent expert

50. The independent expert is quite prepared to endorse the Committee's comments as summarized above.

III. CONCLUSIONS AND RECOMMENDATIONS

51. In his comments, the independent expert hopes he has helped to shed light on the scope of the issues raised and the difficulty of restricting the debate about a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights.

52. How can the challenge be taken up and the rights set forth in the Covenant made more real? How, moreover, can the prevailing trend towards social deprivation, even in many developed countries, be reversed and "recognition of the inherent human dignity and of the equal and inalienable rights of all members of the human family [which] is the foundation of freedom, justice and peace in the world" promoted in accordance with the principles stated in the Charter of the United Nations, when we know that, as the preamble to the two international covenants on civil and political and on economic, social and cultural rights says, the ideal of free human beings enjoying civil and political rights and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights as well as his economic, social and cultural rights? There are as many solutions to discover or rediscover as there are questions, one of which is certainly to strengthen the international machinery designed to ensure that States parties honour the commitments they make when they ratify international human rights instruments.

53. The independent expert is thus prompted to recommend the passage by the Commission, at its forthcoming session, of a resolution that begins by confirming States' solemn commitment to the eventual adoption of a draft protocol to the International Covenant on Economic, Social and Cultural Rights. Such a commitment in principle will, in the expert's view, mark a step forward in the current process inasmuch as it will confirm the principle that all human rights, as the Vienna Declaration and Programme of Action acknowledge, are universal, indivisible, interdependent and interrelated, and do not lend themselves to differences in treatment at the international level or to any attempt at ranking.

54. Should one go further and respond to the question raised by the Commission in resolution 201/39 on future action by recommending "the establishment of an open-ended working group of the Commission to examine the question of a draft optional protocol to the Covenant"? The independent expert recommends that whatever resolution the Commission adopts should maintain the principle of setting up a working group; that, too, would mark a step forward in the current process towards the eventual adoption of a draft protocol.

55. The independent expert also recommends, however, that the working group, although in principle a possibility, should not be set up immediately: the matters at issue still provoke too much doubt, uncertainty, and even outright opposition among member States. The group would be in danger of finding the same antagonisms reflected within it, hampering its operations and progress within reasonable deadlines. The independent expert therefore recommends, as was orally suggested to him during his consultations by, among others, certain State representatives attending the round table organized by the International Commission of Jurists, an extension by the Commission of his mandate so that he can pursue his inquiries in greater depth and clarify his arguments, seeking possible ways of striking a coherent balance among necessarily divergent concerns.

56. Hence the independent expert concludes by recommending, in substance:

(a) Adoption by the Commission, at its forthcoming session, of a resolution that begins by confirming States' solemn commitment to the eventual adoption of a draft protocol to the International Covenant on Economic, Social and Cultural Rights;

(b) That the resolution the Commission adopts should maintain and affirm the principle of setting up an open-ended working group of the Commission to examine the question of a draft optional protocol to the Covenant;

(c) Extension of the independent expert's mandate so that he can pursue his inquiries in greater depth and submit to the Commission at its fifty-ninth session a report that could serve as a basis for the working group of the Commission as it begins to consider the question of a draft optional protocol to the Covenant.

Notes

[1] Document 146 EX/7, para. 50. See also, on the Committee's working methods and for figures on the communications examined, document 154 EX/16 of 24 February 1998.

[2] Marc Maindrault, "Les aspects commerciaux des droits sociaux et des droits de l'homme du travail", *Revue de droit social*, November 1994, p. 850.